23

(3)

No. 08-984

IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERNSTEIN, DENNIS VACCO, AND PAUL DEBARY,
Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC., AND PARK PLACE ENTERTAINMENT CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

DENNIS C. VACCO, ESQ.
CRANE PARENTE AND CHERUBIN
90 State Street
Albany, NY 12207
(518) 432-8000

JOSEPH E. BERNSTEIN ESQ.
Counsel of Record
1045 Fifth Avenue
New York, NY 10028
(917) 365-3651

Counsel for Petitioners

March 16, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 08-984

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERNSTEIN, DENNIS VACCO, AND PAUL DEBARY,
Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC., AND PARK PLACE ENTERTAINMENT CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

TRANSCRIPTION ERRORS

We apologize for the following transcription errors:

On line 9 of page 14 of the Petition, the sentence should read "BIA did [not] seek to approve or request an amendment to the LPA, the contract under which the Tribe would acquire the 29-acre Project site."

On Appendix page 275a, the BIA's Findings of Fact, the second and third lines of the last paragraph

omitted certain figures in the transcription, relating to the land price under the LPA and the appraisal of the land. This should read as follows: "The Land purchase agreement establishes a purchase price of [$10,000,000]. The Monticello Property was appraised at [$95,760,000] as of July 1, 1999, by Appraisal Group International..." The appraisal was based on the land having full zoning rights for a class III casino.

PARTIES TO THE PROCEEDINGS

Respondent disputes that the enrolled members of the St. Regis Mohawk Tribe are parties to this proceeding. Respondent's claim is that the status of the tribal members as beneficial owners depends on the ultimate validity of a "purported assignment" (of a St. Regis Mohawk Tribal Court judgment against Respondent). This is not correct. The tribal members have been issued 50% of the units of the Trust under an order of the Tribal Court, which Respondent did not appeal, and cannot be undone by subsequent events.

The history of the judgment and Respondent's improper influence of Interior Department officials by ghost-writing a response to a federal judge, relating to the recognition of the judgment by the United States, may be found at www.catskilltrust.com: Vacco, Dennis C. *Investigative Report*, May 23, 2007. The ghost-written letter was subsequently vacated by the court.

EFFECT OF THE DECISION IN *CARCIERI V. SALAZAR*

Initially, we note that the St. Regis Mohawk Tribe has been recognized and under federal jurisdiction for over 200 years, such that the proposed transfer of land into trust in the instant case by the Catskill Group to the Tribe would not have been adversely af-

fected by the decision in *Carcieri v. Salazar*, 172 L. Ed. 2d 791 (No. 07-526, Feb. 24, 2009).

We urge the Court to adopt the same approach in interpreting the definition of "Indian lands" under §2703(4)(B) ("is held") as it did in *Carcieri* in interpreting the term "now" for purposes of §479. The term "is held" is equally unambiguous as the term "now", and calls for a present tense interpretation.[1]

BASIS FOR THE WRIT

With denial of the *Guidiville* petition in January 2009, the conflict between the cases has been cast in stone. The Ninth Circuit's decision is the right one– there is no federal jurisdiction over agreements relating to future trust lands. Not under §81, and not under IGRA.[2]

Simply stated, there is no basis for federal preemption of an otherwise valid state contract when there is no federal interest to protect. There has never been any question that the contracts treated as void below were in full compliance with federal law

---

[1] Respondent claims Petitioners raised the Indian lands issue for the first time on appeal and in only one sentence in a motion for reconsideration in the District Court. This is simply not true. Petitioners' response to Respondent's motion to dismiss covered this subject *extensively*, as did Petitioners' motion for reconsideration, and its reply, as far back as 2001. In addition, Petitioner's response to Respondent's summary judgment motion incorporated all of the prior arguments in footnote 1. These documents are available for review.

[2] The Ninth Circuit's reference to the position of the tribe in that case that its contract was void under IGRA was simply a recitation of a fact statement by the tribe, not law, and did not even rise to the level of dicta. The tribe would have been expected to take this position in the litigation, and this point was simply not briefed or decided in *Guidiville*.

and required by their terms that the parties obtain all federal approvals necessary to implement the activities in which the federal government had an interest. By using pre-emption as a shield from its responsibilities under state law, respondent has actually defeated the federal interest in the contracts by withdrawing them from the federal review process. This has resulted in a miscarriage of justice by simultaneously undermining the federal Indian gaming regulatory scheme and needlessly involving the federal courts in the derogation of state contract and tort law.

Guidiville holds Indian lands to be a prerequisite to jurisdiction of the Interior Department under §81. The same should hold true under IGRA.[3] As set forth in the Petition, the authority of the Secretary under §81 was transferred to the Chairman under §2711(h), and approval of agreements relating to trust lands under §81 and IGRA are rooted in the same trust responsibility to tribes with respect to "Indian lands".

Catskill will create much confusion about the status of agreements relating to transfers of land into trust, as well as to what constitutes a management contract. The validity of tribal agreements is certainly of key importance under IGRA, which Congress enacted in a desire to promulgate *clear stan-*

---

[3] *See, Indian Gaming Regulatory Act Amendments of 2006 Report*, June 6, 2006 (S. 2078), *109 S. Rpt. 261:* "... [T]here are instances when the NIGC must make a determination, to meet its regulatory responsibilities, whether a given parcel of land is Indian land *such that the agency has jurisdiction over the gaming activity on it*. The Committee does not intend to preclude the NIGC from determining whether lands are Indian lands *for the purposes of determining its jurisdiction*." (Emphasis supplied.)

dards and regulations for gaming on Indian lands.[4] Clarity is required at this juncture, and the Court can help provide it, reducing future litigation in Indian country that the dichotomy between *Guidiville* and *Catskill* will certainly engender.

There is a second basis for granting the Petition – "*an important question of federal law that has not been, but should be, settled by this Court...*" Rules of the Supreme Court, Rule 10(c). Catskill raises a number of important questions of federal law—whether NIGC has jurisdiction over proposed management contracts before land is held in trust, whether IGRA preempts contracts subject to state law where no Indian lands are involved, whether tribes are precluded from entering into precursory agreements to seek approval of management contracts, and whether *alleged excess fees* may, contrary to § 502.15, convert a collateral agreement with no management functions into one anyway, subjecting viturally all conceivable contracts related to a management contract to NIGC approval. This burden on the NIGC was never contemplated by

---

[4] A significant purpose of IGRA was to address deficiencies in §81: "Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts... " §2701(2). "Existing federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands... " §2701(3). Senate Rep. 99-493 confirms the Chairman derives his authority from the Secretary: "... Actually, however, *this section merely delegates to the entire Commission the power already possessed by the Secretary of the Interior under existing law (25 U.S.C. 81) to approve management contracts...* Accordingly, *H.R. 1920 effectively shifts control over management contracts from the Secretary to the Commission...* " Senate Rep. 99-493, Sept. 24, 1986, at 30 (Emphasis supplied.)

Congress, and the NIGC is ill equipped to commence valuing all agreements related to a management contract subject to approval. It runs counter to the legislative regime and intent of Congress, and also to tribal self determination in second-guessing the business judgment of tribes. Indeed, the purpose of NIGC approval is administrative—to make sure all statutory requirements have been complied with, and not to serve as a "big brother" to tribes.

Catskill also introduces a new variable—*federal preemption* of agreements with Indian tribes governed by state or tribal laws, where no Indian lands exist, by virtue of the voiding provisions of Reg. §533.7, promulgated by the NIGC under authority of the voiding power under §81. IGRA has no independent statutory voiding provision (except under §2711(f) for previously approved management contracts).[5]

Any collateral agreement governed by state law, that has a value element flowing from a tribe, is now subject to classification as a management contract if the amount involved may be argued to exceed the value of the asset or service passing to the tribe, based on the notion that it is 'excessive' and, hence, a 'disguised management fee', notwithstanding that there is no management function. All *collateral agreements may theoretically require valuation because they may become management contracts if price exceeds value, by any amount.* This will become unmanageable. Who will determine value, and how,

---

[5] §2711(f): "Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated."

is open to question. *Catskill* thus adds uncertainty to the status of agreements with Indian tribes nationwide. By subjecting land sale contracts to approval by the NIGC (and thus Reg. §533.7), it also creates a statutory role for the NIGC in the acquisition of land in trust for gaming purposes, which is not authorized by statute as a function of the NIGC. §2711(g) (Management contract shall not transfer interest in real property).

Respondent's proposition that all collateral agreements even indirectly related to a proposed casino are to be subject to approval if they provide for excess compensation vastly expands the NIGC's role and jurisdiction, far beyond agency practice and statutory authority.

RESPONSE TO BRIEF IN OPPOSITION

Respondent ignores Petitioner's analysis that the NIGC has no authority or jurisdiction over proposed management agreements absent existing Indian lands.[6] Respondent restates, without authority, the conclusory determination of the Second Circuit that Indian lands are not required for IGRA's class III management contract approval provisions, simply because the words 'Indian lands' are not found in §2710(d)(9). We stand by our original analysis on this point.

We further point out that when Congress transferred the authority of the Secretary to the Chairman under §2711(h) in 1988, §81 was limited to *service agreements* that were *relative to Indian lands*. The

---

[6] *See, e.g., Lac Courte Oreilles Band v. United States*, 367 F.3d 650 (7th Cir. 2004)(Before land is taken into trust, it is within the jurisdiction of a state and is not yet subject to federal regulation under IGRA.)

amendment to §81 in 2000 made clear, in §81(f)(2), that the revised statute was not to affect the previous transfer of authority from the Secretary to the Chairman.[7] Hence, any argument that a particular section or subsection of IGRA does not refer to "Indian lands" does not take into account the origin and purpose of a comprehensive statutory scheme designed to deal with service agreements relating to Indian lands. §2701(1)-(3).

Respondent claims that the intent of IGRA is to shield tribes from any commitment that "relates to" the management of a gaming operation. The statutory language requires that the agreement "provides for" management of a "gaming operation", not merely *relate* to it. Reg. §502.15 (definition of a "management contract"); Reg. §502.10 (definition of a "gaming operation" as a *presently* operating business). The LPA has no management provisions, and, in fact, would terminate prior to the management contract becoming effective. Closing of the land transfer would necessarily predate the effective date of the management contract.[8] Respondent's position would invalidate tri-

---

[7] "Construction – Nothing in this section shall be construed to ... (2) amend or repeal the authority of the [NIGC] under the [IGRA]." §81(f)(2).

[8] The BIA did not require approval of the LPA, as there were no "Indian lands". The NIGC did not require approval of the LPA as there was no management function and payment for the land did not come from gaming operations as the LPA would be consummated when the land went into trust. The District Court correctly determined in Catskill I that no statute exists with respect to approval of a land-to-trust "contract", as opposed to the transfer itself. Appendix, at 179a. Indeed, no purchase agreement whatsoever is even required for this purpose. *See*, 25 C.F.R. § 151.9 (request to take land into trust need not be in any special form, but must set forth the identity of the parties, a de-

bal agreements to purchase fee simple lands before any federal trust responsibility arises.

In fact, so long as a management contract is *not operative and has been submitted for approval*, it is not technically a "management contract" under IGRA. Under §2710(d)(9), a tribe *may enter into a management contract with approval of the Chairman*. The tribe and manager must execute the agreement and submit it to the NIGC. Reg. §533.2(b). But the executed agreement cannot be a "management contract" before it is entered into, as the tribe may not enter into one. That can only happen, according to the statute, after approval. What we have, then, is an inoperative management contract that is intended to *spring to life upon approval*, meaning that the parties must have agreed to be bound under the agreement when final approval is obtained, and a binding contract thus exists under state law that must be countenanced by federal law. Otherwise, upon approval, either side may simply "walk" and the approval would be for naught. This is an additional agreement—to be bound by a final approval, that Respondent also interfered with in April 2000.[9]

As to Respondent's argument that Congress enacted IGRA to protect tribes from making pre-approval commitments, logic dictates that Congress did not mean to bar tribes from agreeing to seek approval from the NIGC for proposed management contracts. While precursory commitments are binding, they are

---

scription of the land to be acquired, and information indicating compliance with the statutory requirements for the transfer).

[9] *See, Thorstenson v. Norton*, 440 F.3d 1059 (8th Cir. 2006) (Nothing should hinder an Indian's right to enter into a binding agreement that remains subject to federal approval)

not binding as to the underlying contract, but only as to seeking the approval. Congress could not have meant to countenance that tribes be able to enter into transactions with developers, managers and land owners, and then renege, on a whim, prior to a full review by the NIGC. This is particularly true in the era of self determination, where Congress left to a tribe's business judgment the decision to enter into any collateral agreement that does not provide for actual gaming management functions, at whatever price it deems proper.

Respondent claims that the District Court ruled that Petitioner could not prove that Respondent's actions were the proximate cause of a failure to consummate the project. Respondent is misapplying the law. This point was raised in relation to Count II. In a tortious interference with *contract* action, in contrast to interference with business relations, if there is a binding contract, the "but for" test is not applicable, as a contract already exists. It is the breach of the contract itself that is actionable, not the failure to consummate a future business relationship.[10]

---

[10] Whether or not the project would have been consummated more properly goes to the question of damages. In this regard, because Respondent's wrongdoing prevented the project from going forward, under the 'prevention doctrine', Respondent should not be permitted to profit from its own wrong. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264-265, 90 L. Ed. 652, 66 S. Ct. 574 (1945) ("It is elementary that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.") Respondent complains that the record is devoid of reference to the recurring involvement of Park Place Entertainment Corporation, and Harrah's Operating Company, Inc., intentionally derailing tribal gaming projects of competitors. A simple Lexis-Nexis search will reveal numerous cases and news articles regarding their past conduct (not including unreported cases).

One of Respondent claims is that the BIA did not determine the price of the land was reasonable. *In fact, the BIA (or NIGC) never determined the price to be unreasonable.* The Court of Appeals made this factual determination without any record of valuation below, based simply on allegations made by Respondent on appeal. No valuation was made at the District Court level, or by the BIA or NIGC, at any time. The April 19, 2000, final NIGC review letter set forth all of the NIGC's issues. These last documents did not determine that the $10 million purchase price for the land was an obstacle or remained an issue at that point of time for the NIGC. The BIA was going to certify the land value, as it described in the Findings of Fact (Appendix, at 275a-276a), and the NIGC was content to let the BIA perform this function.

Respondent attempts to smear the Catskill Group by alleging that *two principals of the Catskill Group* were convicted, and one is a fugitive. These persons were not principals of the Catskill Group. They were principals of a public entity that was one of four partners in the group. They were indicted *two years after* the interference by Respondent, with respect to tax and other matters having nothing to do with the Catskill Group or the Mohawk project, and with respect to which there was no public information in April 2000, when Respondent stole the Tribe. When their personal problems surfaced *in 2002*, the Catskill group took control of their public company and defeased the interests of these persons with the cooperation of the U.S. Attorney and New York Racing & Wagering Board. The public company's gaming licenses were never at risk.

CONCLUSION

In closing, we note that Respondent has no standing to claim the benefits under federal voiding statutes, enacted solely for the benefit and protection of Indians. *Schmit v. International Finance Management Co.*, 980 F. 2d 498 (8th Cir. 1992)(§81); *Texaco v. Pennzoil*, 729 S.W. 2d 768 (Tex. App.-Houston [1st Dist.] 1987) (voiding provision meant to protect shareholders, cannot be invoked by interferer).

Respectfully submitted,

DENNIS C. VACCO, ESQ.
CRANE PARENTE AND CHERUBIN
90 State Street
Albany, NY 12207
(518) 432-8000

JOSEPH E. BERNSTEIN ESQ.
Counsel of Record
1045 Fifth Avenue
New York, NY 10028
(917) 365-3651

Counsel for Petitioners

March 16, 2009